No. 14,996

In the

United States Court of Appeals

For the Ninth Circuit

HAROLD L. WARD, et al.,
Appellants,

vs.

UNION BOND & TRUST COMPANY, a Corporation,
Appellee.

Appellants' Opening Brief

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This is an appeal from a final judgment of the District Court of the United States for the Northern District of California, Southern Division, Honorable Louis E. Goodman, Judge Presiding.

JURISDICTION

The action was filed by Union Bond & Trust Company, an Oregon corporation, against Blue Creek Redwood Company, Inc., a dissolved Delaware corporation, and a number of individual defendants, all citizens and residents of the State of Michigan. The amount in controversy is in excess of $3,000.

The jurisdiction of the District Court was based upon Section 1332 of Title 28 United States Code. The juris-

diction of this court is based upon Section 1291 of Title 28 United States Code.

The complaint is found at page 3 of the transcript. The jurisdictional allegations are on pages 4 and 5. The notice of appeal is on page 181.

STATEMENT OF THE CASE

On May 1, 1946, A. K. Wilson, the assignor of appellee, as buyer, and Blue Creek Redwood Company, Inc., the assignor of the individual appellants, as seller, entered into a contract for the purchase and sale of certain timber lands in Humboldt County, California.

For the purpose of brevity, appellee (plaintiff and cross-defendant below) will hereinafter be referred to as Union while appellants (defendants and cross-complainants below) will be referred to as Ward. For the same reason, Ward, rather than Blue Creek Redwood Company, Inc., will be considered to have been the seller and Union, rather than A. K. Wilson, will be considered to have been the buyer.

The contract (Exhibit A attached to the complaint (10-34)*) was more in the nature of an option than an actual contract of sale. Although Ward agreed and bound himself to sell, there was no corresponding obligation to buy on the part of Union.

By making the payments specified in the contract and otherwise complying with its terms, Union could obtain title to the land and to the timber located thereon. It was under no prospective obligation, however, either to make the payments or to comply in any other way with the terms of the contract. On the contrary, it could abandon the contract at any time it chose whereupon it would cease to have any liability thereunder except of course for payments that had

*All references will be to pages of the transcript.

already become due (see clause 12 of the contract, page 21).

In other words, since, as will hereinafter appear, the purchase price was a fixed sum to be paid over a period of ten years, Ward took the risk of any substantial decline in the market while Union stood to reap all of the profits resulting from an increase in timber prices.

The purchase price was $750,000.* Payments were to be made as follows: $25,000 down and the balance at not less than $40,000 a year with Union having the right to log the lands and pay for the logs removed at the rate of $5.00 per thousand feet (clause 2, pages 11-12). The payments for the logs (called stumpage payments) were to be applied against the minimum annual payments of $40,000. The entire purchase price was to be paid not later than May 15, 1956 (clause 2(f), page 12).

The stumpage payments were to be made on or before the 20th of the month following the removal of the logs (clause 2(d), page 12).

The contract required Union to scale the logs removed from the land and to provide Ward with copies of the scale slips† and with monthly reports of the total quantity of

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*The original purchase price was $600,000 (clause 2, page 11) but the contract contained an option to acquire an additional tract of land and the timber located thereon for an additional sum of $150,000 (clause 7, pages 14-15). That option was later exercised by Union.

†After a tree has been felled and cut into logs, each log is scaled or measured to determine the number of feet of merchantable lumber which it contains. In this case, the scaler prepared a scale slip in quadruplicate on which he noted the footage of each log, the area from which the log came as well as other necessary information. One copy of the scale slip was intended for the mill and another for the trucker. The pink copy was eventually to be sent to Ward under the terms of the contract and the original (white) slip was retained by Union (305-6, 537-8).

The scale slips are the only original source of information as to the quantity of logs removed. They served as the basis for a number of permanent books of record, however, including the stumpage

logs removed. The scale slips and the monthly reports were to be sent to Ward with the stumpage payments (clause 11, page 19).

The contract also provided that Union was to pay all current property taxes when due (clause 4, page 13).

As we have already indicated, Ward did not have the right (which the vendor usually has in an installment contract) of suing Union for damages or for the balance of the purchase price.

Under clause 12 of the contract (21), the only remedy available to Ward in the event of a default by Union was the right to cancel the contract, resume possession of the property, retain the payments made by Union and recover unpaid stumpage payments.

Notice of cancellation could not be given, however, unless the default had continued for a period of 60 days after written notice by Ward to Union.

At all times material to this action, Union was owned and controlled by A. K. Wilson and his immediate family, A. K. Wilson being president and in direct charge of all of its affairs (631-2).

Prior to April of 1953, Union itself did no logging (326) although a considerable amount of logging was done by A. K. Wilson through other corporations similarly owned and controlled by him.

On the lands involved in this action, the logging was done by Coast Redwood Company, one of those corporations (which will hereinafter be referred to as Coast), under

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book, a running record of the quantities of logs removed from a given area with totals entered daily and accumulated periodically.

Any information that might be needed as to the quantity of logs removed during a given period or as to the amount of stumpage payments to be made to Ward was readily obtainable from that book.

a license from Union (383, 543-4). Although Coast did some logging and road building on those lands prior to 1950, substantial logging operations did not begin until early that year. They continued until June of 1954 when all of the lands covered by the contract situated in Township 12 had been logged. To date, there has been no logging in Township 11.

In the early part of 1953, Coast and A. K. Wilson Lumber Company, another of A. K. Wilson's operating companies, filed petitions under Chapter XI of the Bankruptcy Act (303, 599). Thereafter, they continued operating as debtors in possession until each was adjudicated bankrupt in October of 1954.

As a result of those proceedings, the logging operations of Coast were conducted under the direction and control of a Creditors' Committee. The net proceeds of those operations went to the Creditors' Committee after payment of the operating expenses including the stumpage payments which Coast made to Union (334) and which Union was in turn required to make to Ward under the terms of the contract.

Since the profits from Coast operations went to the Creditors' Committee, Union itself began logging operations in April of 1953, first on lands not covered by the Ward contract and, beginning in June of 1953, on lands which were covered by the contract (306, 341, 536).

In other words, from then on, there were two separate logging operations on the Ward lands (341). Needless to say, Union was required to report and pay for all the logs removed from those lands whether by Coast or by Union itself.

The parties have stipulated that such exhibits as they deem material may be printed as an appendix to their

respective briefs (1003). Pursuant to that stipulation, we have printed, as an appendix to this brief, Defendants' exhibits I, AB and AC.

Exhibit I is a compilation of the payments made by Union showing the date of each payment and the purpose for which it was intended. Exhibit AB is a compilation of notices of default sent by Ward. Exhibit AC is an analysis of Union's performance under the contract between June of 1949 and March of 1954 showing, as to each month during that period, whether or not payments, reports and scale slips were sent on time.

Those exhibits graphically illustrate the conditions under which Union carried out its part of the contract. They show that, after Coast began logging, Union was in default under the contract practically all the time.

Every month but two, Union failed to pay for logs removed by the 20th of the month following their removal. Every month but nineteen, it failed to report the quantity of logs removed by the 20th of the month following their removal. Every month but twenty, it failed to send the scale slips to Ward by the 20th of the month following the removal of the logs.

Only once throughout the entire period of the contract did Union send the necessary scale slips, report and payment to Ward by the 20th of the month following the removal of the logs.

As a result of those repeated defaults, Ward was caused to send a total of 54 default notices to Union.

Some of those defaults must be described in greater detail.

Union failed to send scale slips, monthly reports or payments for logs removed during the months of June, July, August, September and October of 1953, by the 20th of the following month.

On each occasion, Ward caused a notice of default to be sent to Union and, within sixty days from the date of each default notice, Ward received from Union the scale slips, monthly report and payment for the logs which *Coast* had removed from the lands covered by the contract (and for which it had made stumpage payments to Union).

Union failed to send to Ward, however, the scale slips, monthly reports and payments covering the logs which Union itself had removed during that period. Logs having a contract price value in excess of $35,000 were thus removed by Union, unreported and unpaid for (findings 6 and 7, pages 156-8).

Union also failed to pay the property taxes for the year 1953-54 when due or within sixty days after demand by Ward that they be paid (finding 8, page 158).

As a result of the foregoing defaults and of Union's failure to correct them within sixty days after written notice, Ward terminated the contract as of May 12, 1954 (finding 10, page 159).

On May 20, 1954, this action was filed by Union. The complaint alleged that Union was not in default in any respect under the terms of the contract and that, such defaults as there were, if there were any, were the result of inadvertence and excusable neglect (3-10).

Union prayed for a declaration that the contract was in full force and effect, for its specific performance and for a decree quieting its title to the land (9-10).

The complaint contained a number of other allegations covering miscellaneous matters including a claim for damages allegedly sustained by Union as a result of Ward's attempts to regain possession of the land. The trial court did not find in favor of Union on any of those matters and

they are in no way material to the issues presented on this appeal.

Ward filed an answer and cross-complaint alleging the existence of the defaults, the failure to correct them within sixty days after notice, and the termination of the contract and denying that the defaults were the result of inadvertence or neglect (36-51). Ward prayed that his title to the property be quieted and, in addition, asked for a money judgment covering logs removed and unpaid for as well as the unpaid taxes on the property (49-50).

Union later filed an amended complaint in which it admitted the defaults but still claimed that they were the result of inadvertence and excusable neglect (114-128). In addition to the relief prayed for in its original complaint, Union also asked that it be relieved of the forfeiture which, as it alleged, had resulted from the termination of the contract (127-8).

At the trial, Union primarily sought to prove that its admitted defaults were the result of inadvertence or excusable neglect and took the position that the contract should be reinstated and its title to the property quieted upon payment of the balance due on the purchase price together with Ward's damages.

Ward primarily sought to prove, however, that the defaults were fraudulent, or at least wilful, so that Union was at most entitled to restitution of the excess, if any, of its payments over the damages sustained by Ward.

This court will note that, at the beginning of its opinion, the trial court stated that the parties agreed that Union was entitled to some relief (139). No such concession was made by Ward. Ward of course conceded the law to be that a wilfully defaulting vendee may be entitled to relief against the unjust enrichment of the vendor. It was Ward's position

at all times, however, that, under the facts of this case, there was no unjust enrichment and that, in any event, the conduct of Union was such and its hands were so unclean, that it should be denied all equitable relief.

The trial court found that the defaults were wilful within the meaning of Section 3275 of the Civil Code of California (138, 159).

It also found that a total of approximately $585,000 had been paid on account of the purchase price (finding 4, page 156); that Union had removed but not paid for logs having a contract price value in excess of $70,000 (findings 7, 9 and 11, pages 157-159); and that Union had failed to pay the taxes that were due on December 10, 1953. (Finding 8, page 158.)*

The trial court then found and/or concluded that the termination of Union's rights under the contract would result in a forfeiture and penalty and that justice and equity required that the contract be reinstated upon the payment by Union of the entire purchase price together with Ward's damages resulting from the delay in performance (conclusions 2 and 3, pages 159-160).

The court made and entered an interlocutory decree giving Union 45 days to deposit in court the balance due on account of the purchase price (160-1).

A hearing was then held to determine Ward's damages which the trial court limited to the interest on past due payments, the costs of investigating the defaults, the costs and expenses of the action and reasonable attorneys' fees (162-166).

Union deposited in court the additional amount of approximately $35,000 which the trial court allowed as Ward's

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*The total of the taxes due and unpaid as of May 12, 1954, was stipulated to be in exeess of $9,000 (838-9).

damages and a final judgment quieting Union's title to the property was then entered (170-176).

It is from that judgment that this appeal is taken.

SPECIFICATION OF ERRORS

(1) The District Court erred in allowing Union (a wilfully defaulting vendee) to complete the contract (by paying the balance of the purchase price plus attorneys' fees, interest and certain of Ward's costs and expenses) and obtain title to the land since, under the applicable California law, a wilful defaulting vendee is not entitled to reinstatement of a contract terminated by the vendor because of the wilful defaults of the vendee.

(2) The District Court erred in concluding that justice and equity required that Union be allowed to complete the contract since, under the applicable California law, (a) restitution of the amounts paid by him in excess of the damages sustained by the vendor is the only equitable relief from a forfeiture and penalty (assuming, but not conceding, that there was a forfeiture and penalty in this case) to which a wilfully defaulting vendee may be entitled and (b) Union's defaults and conduct under the contract were such as to require in any event that it be denied all equitable relief.

(3)(a) The District Court erred in finding and concluding that a forfeiture and penalty resulted from the termination of the contract.

(b) The District Court erred in finding and concluding that a forfeiture and penalty resulted from the termination of the contract in the absence of (1) a finding as to whether the amounts paid by Union exceeded the damages sustained by Ward and (2) a finding as to the reasonable value of the use of the property during the eight years during which Union was in possession of the property.

(c) The District Court erred in finding and concluding that a forfeiture and penalty resulted from the termination of the contract since (1) there is no evidence in the record as to whether the amounts paid by Union exceeded the damages sustained by Ward and (2) there is no evidence in the record as to the reasonable value of the use of the property during the eight years during which Union was in possession of the property.

ARGUMENT

Summary of the Argument

(1) The trial court should have denied Union relief by way of reinstatement of the contract since, in a decision on the subject binding upon the trial court, this court had previously held that, under California law, a wilfully defaulting vendee is not entitled to reinstatement of such a contract.

(2) Under California law, a wilfully defaulting vendee is not entitled to reinstatement of a time of the essence installment contract terminated by the vendor because of the wilful defaults of the vendee.

Restitution of the excess of his payments over the vendor's damages is the only equitable relief to which he may be entitled. Hence, in this case, Union should have been denied relief by way of reinstatement of the contract.

(3) Before he can be entitled to relief by way of restitution of part of his payments (or, for that matter, to any other relief), a defaulting vendee must show that he suffered a forfeiture or penalty for otherwise there is nothing from which he can be *relieved.*

The burden of proof as to that issue is upon him. Proof of a forfeiture or penalty requires proof of the *unjust* enrichment of the vendor. Whether the vendor was or was not unjustly enriched cannot be determined without proof of

the value of the use of the property while the vendor was deprived of its possession.

In this case, Union failed to prove and the trial court failed to find the value of the use of the property during the 8 years that Ward was deprived of its possession. Without a finding on that issue, there could be no finding of unjust enrichment. Hence, there could be no relief by way of restitution.

(4)(a) In any event, Union should have been denied all equitable relief because it came into a court of equity with hands particularly unclean.

(b) The decision of the trial court is inequitable and unfair for the further reason that *Union* had the right to cancel the contract at any time it chose without incurring further liability thereunder. Hence, Ward should not have been deprived of the right to cancel it for cause (which was the only remedy given him by the contract).

(1) In a decision binding upon the trial court, this court had previously held that a wilfully defaulting California vendee is not entitled to reinstatement of the contract.

Concededly, this case is to be decided on the basis of California law (the contract itself so provides (22)).

This very question (of the right of a defaulting California vendee to reinstatement of a time of the essence contract) was before this court on three recent occasions.

In *Federal Farm Mortgage Corporation v. Davis* (1942), 132 F.2d 663, this court held that, under California law, a defaulting vendee was not entitled to relief following the termination of the contract by the vendor because of the vendee's defaults.

That ruling was reaffirmed in *Starr King School for the Ministry v. Kinne*, 146 F.2d 8, certiorari denied, 325 US 850, 89 L.ed. 1970, decided in 1944.

Finally, on June 3, 1949, this court decided the case of *Wuchner v. Goggin,* 175 F.2d 261. The trial court in that case had granted relief to the vendee and reinstated the contract. This court reversed the judgment. In reversing it, however, it noted that the District Court of Appeal of the State of California, First Appellate District, Division One, had just decided *Barkis v. Scott,* 201 P.2d 830, a case which made a significant change in the law of California.

As will hereinafter appear, a hearing was granted in that case by the Supreme Court of California. As will hereinafter also appear, the opinion of that court, which is reported in 34 C.2d 116, 208 P.2d 367, confirmed the change in the law made by the District Court of Appeal.

The *Barkis* case will be reviewed in detail later on in this brief. It is enough to say at this point that the District Court of Appeal held in that case that a defaulting vendee is entitled to reinstatement of a time of the essence contract if he can bring himself under the provisions of Section 3275 of the Civil Code of California (if he can prove that his default was neither grossly negligent, nor wilful nor fraudulent).

Instead of reversing the judgment in *Wuchner v. Goggin,* supra, with directions to give the defaulting vendee no relief at all, as it would have done prior to *Barkis v. Scott,* supra, this court instructed the trial court to determine whether or not the vendee could bring himself within the provisions of Section 3275. The pertinent part of the opinion is as follows:

> "In the instant case we are not so sure that an equitable showing was attempted to be made or that it was not made. We do not intimate nor hint at any conclusion for we entertain none as to what the facts, fully brought out upon the issue presented by the application

of § 3275, Cal. Civ. Code, would show. We do hold that the trial court should try that issue. Accordingly the order will be and is:

"The judgment is reversed and the cause is remanded with instructions to find in accordance with this opinion that the contract had become of no effect prior to the tender of the unpaid balance of the contract purchase price of the property in suit by the trustee, through default in making purchase payment, unless the default should be excused through the application of § 3275, Cal. Civ. Code and the equitable principle expressed in the herein quoted portion of the Glock opinion." (175 F.2d at page 270.)

In other words, this court held that the defaulting vendee would be entitled to no relief (*that the contract had become of no effect, hence could not be reinstated*) if his default was grossly negligent, wilful, or fraudulent.

That was the law of California as this court found it at the time of *Wuchner v. Goggin,* supra, (a wilful breach means no reinstatement). That should have been the law that governed the decision of the trial court in this case unless of course the law of California was changed after the decision of this court in *Wuchner v. Goggin,* supra.

As will hereinafter appear, the law of California has *not* been changed. A wilfully defaulting vendee continues *not* to be entitled to relief by way of reinstatement of the contract.

(2) Under California law, a wilfully defaulting vendee is not entitled to reinstatement of a time of the essence installment contract terminated by the vendor because of the wilful defaults of the vendee.

In the last few years, the California courts have crystallized the rules under which a defaulting vendee in a time of

the essence installment contract may be relieved of his default. These rules were announced in the following cases which are listed below in chronological order:

Barkis v. Scott, 34 Cal. 2d 116, 208 P.2d 367.
Baffa v. Johnson, 35 Cal. 2d 36, 216 P.2d 13.
Freedman v. The Rector, 37 Cal. 2d 16, 230 P.2d 629.
Crofoot v. Weger, 109 Cal. App. 2d 839, 241 P.2d 1017.
Bird v. Kenworthy, 43 Cal. 2d 656, 277 P.2d 1.

Prior to *Barkis v. Scott*, supra, a defaulting California vendee was generally entitled to no relief at all whether his default was wilful or not. See the decisions of this court in *Federal Farm Mortgage Corp. v. Davis*, supra, and *Starr King School for the Ministry v. Kinne*, supra.

Under the rules announced on July 1, 1949, in *Barkis v. Scott*, supra, and developed in the cases that followed, a defaulting vendee in a time of the essence installment contract may now be entitled to relief in equity. If his default was neither grossly negligent, nor wilful, nor fraudulent, he may obtain the reinstatement of the contract upon payment of the damages sustained by the vendor as a result of the default. *A fortiori*, he may obtain relief against the unjust enrichment of the vendor by way of restitution of part of his payments.

Even if his default was wilful, a defaulting vendee may now be entitled to some relief. In that case, however, he is not entitled to reinstatement of the contract (the form of relief which would give him the benefit of his bargain). The most that he can obtain is relief against the unjust enrichment of the vendor by way of restitution.

We will first demonstrate that, since its defaults were wilful, Union was not entitled to reinstatement of the contract.

In Section (3) of this brief, we will demonstrate that it was not entitled to relief by way of restitution of part of its payments for the simple reason that it failed to establish (and it had the burden of proof on that issue) that Ward was *unjustly* enriched as a result of the termination of the contract.

In Section (4) of this brief, we will demonstrate that it should have been denied all equitable relief for the further reason that it came into court with particularly unclean hands.

We will begin with a review of *Barkis v. Scott,* supra, and of the pertinent cases that were subsequently decided.

In *Barkis v. Scott,* supra, the vendor brought an action to quiet title following the vendee's default in the payment of two monthly installments (57 installments had been paid without default and the vendee had also made permanent improvements on the property of a value exceeding one-half the contract price).

The trial court found the defaults to have been wilful and quieted the vendor's title without giving any relief to the vendee.

On appeal, the judgment was reversed. The Supreme Court of California held that, under Section 3275 of the Civil Code, the vendee was entitled to the relief for which he asked, namely the reinstatement of the contract.

Section 3275 provides as follows:

> "§ 3275. *Relief in case of forfeiture.* Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty."

The case contains a detailed review of the California law on the subject with which we need not otherwise concern ourselves.

We must emphasize, however, that, in order to reach its decision, the court found it necessary to reverse the trial court's finding that the defaults were wilful.

It did not choose to hold, as it could have done had it been so inclined, that the finding was unsupported, but that, in any event, the vendee was entitled to reinstatement of the contract whether his defaults were wilful or not. On the contrary, it made it clear that relief by way of reinstatement of the contract could be granted only a *non*wilfully defaulting vendee. It is only because, in the opinion of the majority (from which one judge dissented), the finding of wilfulness was not supported by the evidence that that form of relief was allowed.

On March 24, 1950, the Supreme Court of California decided *Baffa v. Johnson,* 35 Cal. 2d 36, 216 P.2d 13. In that case, the action was brought by the vendee to recover his down payment of $5,000. Having made that payment, the vendee refused to proceed with the contract under circumstances which made his breach wilful.

Assuming, without deciding, that the vendee was entitled to relief against the unjust enrichment of the vendor despite the fact that his breach was wilful, the court nevertheless affirmed the judgment denying him all relief. The court held that he had failed to prove that his down payment exceeded the vendor's damages and that the vendor would accordingly be unjustly enriched by retaining both the property and the payment.

The case thus stands for the proposition that the burden is upon the defaulting vendee to prove that the vendor

would be unjustly enriched by retaining both the property and the payments made by the vendee.

On April 27, 1951, the Supreme Court of California decided *Freedman v. The Rector,* 37 Cal. 2d 16, 230 P.2d 629. In that case, the vendee filed suit for specific performance of a contract on which he had made a down payment of $2,000. Having made that payment, he wilfully repudiated the contract.

The Supreme Court affirmed the judgment denying him specific performance or damages since, in view of his repudiation of the contract, he was entitled to neither.

Because evidence of unjust enrichment which was lacking in the *Baffa* case was present in the *Freedman* case,* the court was squarely faced, however, with the question of whether a wilfully defaulting vendee is entitled to relief against the unjust enrichment of the vendor.

The court recognized that, although the vendee was not entitled to relief under Section 3275 of the Civil Code (his breach being wilful), he would be penalized in excess of any damages he caused (and the vendor would correspondingly be unjustly enriched) if he were denied all relief. The court held therefore that, independently of Section 3275, he was entitled to restitution of that part of his down payment which exceeded the vendor's damages.

In reaching its decision, the court relied upon the policy of the law against penalties and forfeitures as well as upon certain specific provisions of the Civil Code dealing with the

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*The vendor resold the property for $2,000 more than the vendee had agreed to pay for it. It was therefore apparent that he suffered no damage as a result of the vendee's breach and that he was unjustly enriched to the extent of the difference between the $2,000 down payment and the broker's commission and other expenses which he himself had to pay.

subject of damages (Sections 3294, 1670 and 1671). Those provisions preclude the allowance of punitive damages in contract cases and authorize liquidated damages in such cases only when it would be impracticable or extremely difficult to fix the actual damages.*

The court held that it was neither impracticable nor extremely difficult to fix the vendor's actual damages. Hence, he could not retain the down payment as liquidated damages.

In our opinion, *Freedman v. The Rector,* supra, compels the conclusion that relief against the unjust enrichment of the vendor (and the resulting penalty to the vendee) is the maximum relief to which a wilfully defaulting vendee can be entitled.

It will of course be argued, however, that, since the vendor had resold the property and relief by way of reinstatement of the contract could no longer be given the vendee, the *Freedman* case is distinguishable.

We do not believe that it is.

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*Those sections provide as follows:

"§ 3294. *Exemplary damages, in what cases allowed.* In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant."

"§ 1670. *Contract fixing damages, void.* Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section."

"§ 1671. *Exception.* The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

Relief by way of reinstatement of the contract gives the vendee the benefit of his bargain and enables him to make the profit which he would have made had there been no breach. In the *Freedman* case, such relief (if available) would have given the vendee property worth at least $2,000 more than the price which he had agreed to pay.

Although that $2,000 profit could not be given him by way of specific performance (since the property had been sold), it could still have been given him by way of damages. This, the Supreme Court expressly refused to do.

To us, it made clear by such a refusal that the only relief to which a wilfully defaulting vendee may be entitled is relief against a loss in excess of the damages sustained by the vendor.

Needless to say, in this case, as it would have been in *Freedman v. The Rector,* supra, (and for the same reason) relief by way of reinstatement of the contract is far more advantageous to the vendee than relief by way of restitution. The price of timber has gone up and is still going up. Hence, if the judgment is affirmed, Union stands to make a very handsome profit on the contract which it wilfully breached, a profit which it obviously would not make if it had been given relief by way of restitution.

Can it be that Ward could have kept Union from making that profit simply by selling the property as soon as the contract was cancelled?

Can it be that the answer to the question of whether Union is entitled to that profit depends upon an event as fortuitous and irrelevant as a sale by Ward to a third party after cancellation of the contract?

On March 20, 1952, the District Court of Appeal for the Third District, decided *Crofoot v. Weger,* 109 Cal. App. 2d

839, 241 P.2d 1017. In that case, the vendee filed suit for reinstatement of the contract following its cancellation by the vendor as a result of the vendee's default in the payment of an installment.

It may incidentally be noted that, of all the recent cases on the subject, *Crofoot v. Weger,* supra, is closest on its facts to this case since it too involved a contract for the purchase and sale of Northern California timber.

Without finding whether the default was wilful or not, the trial court gave judgment for the vendor denying any relief to the vendee.

On appeal, the judgment was reversed with instructions to the trial court to determine whether the default was wilful or not and to grant or deny the relief prayed for (reinstatement of the contract) accordingly.

If the default was not wilful, the vendee was entitled to reinstatement under Section 3275. If it was wilful, he was not entitled to reinstatement. In that case, however, the trial court was instructed to determine whether the vendor had been unjustly enriched by the termination of the contract and to grant the vendee relief on that basis by refunding to him the excess of his payments over the vendor's damages.

At page 842 of 109 Cal. App. 2d, the court stated:

> "Likewise the trial court could have found that the loss suffered by the appellants when the respondents terminated the contract was a forfeiture or a loss in the nature of a forfeiture, and such findings, coupled with findings that the breach was neither wilful nor the product of gross negligence would have made proper a reinstatement of the contract upon equitable conditions, if that were still possible, and if not then the recovery by the appellants of such amounts of the payments made as lay within the area of forfeiture.

> "In addition to the foregoing, if the court had found that the breach was wilful or grossly negligent so as to prevent equitable relief under section 3275 of the Civil Code there was still the duty of the court to go further and find whether or not the termination of the contract by the respondents for the appellants' default resulted in the unjust enrichment of the respondents. If such were the result then it would have been the duty of the court to give judgment for so much of the funds paid in as constituted unjust enrichment."

This court will unquestionably note the analogy between the instructions given to the trial judge in *Crofoot v. Weger,* supra, and the instructions which, three years earlier, it itself had given to the trial judge in *Wuchner v. Goggin,* supra. In both cases, relief by way of reinstatement was held to be available only in the event that the default was not wilful.

The *Crofoot* case was cited to the trial court in this case. As is apparent from its opinion, however, the trial court disregarded it completely, although it is a square holding on the subject, one that should have compelled the trial court to deny reinstatement of the contract in this case and that should compel this court to order a reversal of the judgment.

On November 30, 1954, the Supreme Court decided *Bird v. Kenworthy,* 43 Cal. 2d 656, 277 P.2d 1. In that case, the vendee of a tractor which the vendor had repossessed filed suit to recover either all of the payments which he had made to the vendor (by way of a rescission of the contract) or at least the excess of those payments over the damages sustained by the vendor.

The trial court found that his defaults were wilful and denied all relief to the vendee.

On appeal, the court affirmed the judgment. Since his defaults were wilful, the court held that the vendee was not entitled to relief under Section 3275 of the Civil Code. It held further that he was not entitled to any relief on the theory of unjust enrichment (independently of that section) for the simple reason that it affirmatively appeared that there was no such enrichment.

The contract price was $29,000 of which the vendee had paid $24,000. When the vendor repossessed it, the tractor was worth $28,000.

In other words, as the court itself pointed out, the vendor, who would have received only $29,000 if the vendee had completed the contract, received a total of $52,000 ($28,000 representing the value of the tractor and $24,000 representing the payments made by the vendee) as a result of the defaults and the cancellation of the contract.

The court nevertheless held that the vendor was not *unjustly* enriched (there is no doubt that he was *enriched*) for the simple reason that the rental value of the equipment while the vendee had it in his possession was $37,400.

Had he rented it himself during the period of the contract, the vendor would have had $65,400 ($37,400 representing the rental value of the equipment and $28,000 representing the value of the equipment itself). It is only if the payments made by the vendee had exceeded $37,400 that the vendor would have been *unjustly* enriched.

At page 660 of 43 Cal. 2d, the court stated:

> "The purpose of the rule in the Freedman case is to prevent unconscionable inequities resulting from a forfeiture. But where, as here, the vendor would have received greater benefit if the property had remained in his hands than the amount obtained by him because of the forfeiture, there is no inequity."

Bird v. Kenworthy, supra, is significant not only because it restates the rules announced in previous cases but because it sets forth the measure or yardstick which trial courts must use in determining whether the vendor has been unjustly enriched and the vendee penalized as a result of the cancellation of the contract. That determination can be made only if the value of the use of the property while the vendee was in possession is known.

There can be no *unjust* enrichment if, during that period, the vendor gave more than he received. There can be no penalty or "forfeiture" (although there may well be a loss of profits) so long as the vendee received more than he paid for.

In other words, although the trial court in this case seemed to think otherwise, the fact that, as a result of the termination of the contract, the vendor is left with more than the contract price is completely immaterial.

It will of course be argued that *Bird v. Kenworthy,* supra, is distinguishable because the vendee in that case was not seeking to complete the contract.

It must be noted, however, that, before filing suit, the vendee tendered the balance of the principal and interest due on the contract which tender was rejected by the vendor. Can it be doubted that, if relief by way of reinstatement of the contract had been available to the vendee, the court would not have given him an opportunity to obtain it?

By the payment of an additional $4,000 or $5,000 plus interest and damages, the vendee was in a position to obtain a $28,000 tractor. It is not because he did not ask for it that reinstatement (or at least an opportunity to obtain reinstatement) was denied him. It is simply because, his breach

having been wilful, relief by way of reinstatement of the contract could not be given him.*

Yet, the trial court held in this case that Union was entitled to reinstatement of the contract.

It reasoned as follows:

(1) The Supreme Court of California held in *Freedman v. The Rector,* supra, that Sections 3294, 3369, 1670 and 1671† of the Civil Code "require that a vendee in wilful default be relieved from *any* forfeiture * * *" (emphasis supplied.) (147).

(2) Those sections do not prescribe the form which the relief shall take. Hence, a court of equity may grant relief either by way of reinstatement or by way of restitution.

(3) In this case, reinstatement of the contract is the better and more equitable form of relief.

With all due respect, we must say that the trial court's reasoning was altogether faulty.

Neither the foregoing sections of the Civil Code nor *Freedman v. The Rector,* supra, require that a vendee in wilful default be relieved from *any* forfeiture.

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*In *Nelson v. Dangerfield,* 125 Cal. App. 2d 146, 269 P.2d 953, the court held that a non-wilfully defaulting vendee who had sued for reinstatement and "such further relief as may be agreeable in equity" (and to whom the trial court had granted only reinstatement) was entitled to either reinstatement or restitution. We cannot imagine that, in *Bird v. Kenworthy,* supra, the vendee did not ask for the usual "further relief". Hence, he could have been given reinstatement had he been entitled thereto.

†Sections 3294, 1670 and 1671 have previously been quoted. Section 3369 (as far as pertinent) provides as follows:

"§ 3369. (Relief not granted to enforce penalty, forfeiture or penal law: * * * 1. Neither specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case, nor to enforce a penal law, except in a case of nuisance or unfair competition."

The code sections do not deal with forfeiture at all but with damages. They require neither that a wilfully defaulting vendee be relieved from a forfeiture nor that he be denied such relief.

As the Supreme Court pointed out in *Freedman v. The Rector,* supra, Section 3369 precludes the vendor's title from being quieted unless he refunds to the defaulting vendee the excess of his payments over the vendor's damages. If he were not required to refund that excess, there would be a violation of Sections 3294, 1670 and 1671 which forbid punitive and liquidated damages in such cases.

Nowhere in *Freedman v. The Rector,* supra, however, is there any indication that the Supreme Court was "pointing the way" (150), as the trial court said in its opinion in this case, towards the result reached by the trial court in this case. Nowhere is there any indication that the court felt either that the code sections require that the contract be reinstated despite the wilful breach by the vendee or that such relief is desirable in the case of a wilful breach.

The decision was intended to protect the vendee from a penalty resulting from the *unjust* enrichment of the vendor; it was not intended to protect him from the loss of the profits which he would have made had he not breached the contract.

Nor was it intended to keep the vendor from being enriched but only to keep him from being *unjustly* enriched.

In *Bird v. Kenworthy,* supra, the vendee lost the benefit of his bargain. Yet the Supreme Court of California held that he did not suffer a "forfeiture". This can only mean that, in the case of a *wilfully* defaulting vendee, the "forfeiture" of which the vendee may be relieved is *not* the loss of the benefit of his bargain. If he is entitled to any relief at all, it is relief from something else, namely from the loss

which would result from his having paid more than the value of what he received.

It is thus clear that the law of California does *not* require that the vendee be relieved from *any* forfeiture.

The trial court took the position, however, that a wilfully defaulting vendee is "penalized" within the meaning of the various sections of the Civil Code if he is denied the benefit of his bargain and the profit which he would have made had he not breached the contract.

In this, the trial court was in error. Under the law of California, such a vendee suffers no penalty so long as the vendor is required to make him whole before his title to the property can be quieted.

And it is certainly not the purpose of Equity to insure the profit which the vendee would have made had he not breached his contract.

The trial court was similarly in error in concluding that, under the Civil Code sections upon which it relied, a court of equity may grant relief either by way of reinstatement of the contract or by way of restitution.

In fact, the only relief which Sections 3294, 1670 and 1671 would justify is relief against an overpayment of damages.

In other words, if it was entitled to any relief at all, Union was entitled to a recoupment of its financial loss, if any. It was entitled to nothing else. Hence the trial court was altogether in error when it declared that *it* had the choice of granting one or the other form of relief.

The trial court finally concluded that, for a number of reasons, including the fact that conflicting estimates of value might make Ward's damages difficult to determine, reinstatement was the better and more equitable form of relief.

We do not agree that Ward's damages would necessarily be difficult to determine. We do agree, however, that they

could not have been determined in this case *on the record presented to the trial court.*

The burden of proving those damages was on Union (*Baffa v. Johnson,* supra). As will hereinafter appear, it was incumbent upon Union, as a necessary part of the showing which *it* had to make on that issue, to prove the reasonable value of the use of the property while it was in possession and Ward was deprived of possession. (Under the rule of *Bird v. Kenworthy,* supra, the value of the property at the date of termination was not actually material).

Without such a showing, there could indeed be no determination of Ward's damages.

Even if we assume, however, that it would have been difficult to determine those damages with all of the necessary evidence before the court, the decision of the trial court cannot be upheld, for it had the effect of penalizing *Ward* because of *Union's* difficulty in proving Ward's damages.

Far from justifying relief by way of reinstatement, the fact that the damages were "impracticable or extremely difficult" to fix (as both Union and the trial court apparently contend) should have compelled the denial of any relief to Union.

After all, it is only because it was neither impracticable nor extremely difficult to fix the damages in *Freedman v. The Rector,* supra, that the court refused to allow the vendor to retain the vendee's payment as liquidated damages.

In other words, far from being an argument in favor of the reinstatement of the contract, the fact that the damages were difficult to determine, if they were, is an argument in favor of allowing Ward to keep the payments as liquidated damages.

The more it is argued that Ward's damages were difficult to determine, the stronger the argument becomes in favor of enforcing the contract according to its terms.

As will hereinafter appear, there was even greater reason and greater equity to allow Ward to retain the payments in this case since the contract denies him the right to sue Union for damages.

In the course of its opinion, the trial court cited and seemingly relied upon some early California cases in which, before quieting the vendor's title to the property, the court gave the vendee an opportunity to complete the contract.*

Those cases are all distinguishable.

In none of them does it appear that the breach was wilful. In none of them was time of the essence, and, finally, in none of them did the contract provide for cancellation in the event of a default by the vendee.

Moreover, in all of them but one (and that one is otherwise distinguishable), the appeal was by the vendee and not by the vendor. Hence, it was not actually contended that the trial court could not allow the vendee to complete the contract and those cases do not actually support the proposition that a defaulting vendee is automatically entitled to reinstatement of his contract.

The fact that, in all of those cases, time was not of the essence, is of course sufficient to distinguish them completely from this case. They were governed by Section 1492 of the Civil Code of California which expressly allows an offer of performance to be made after default, where time is not

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**Fairchild v. Nullan*, 90 Cal. 190; 27 Pac. 201; *Southern Pacific R.R. Co. v. Allen*, 112 Cal. 455, 44 Pac. 796; *Odd Fellows' Sav. Bank v. Brander*, 124 Cal. 255, 56 Pac. 1109; *Los Angeles A. T. Co. v. Superior Court*, 94 Cal. App. 433, 271 Pac. 363; *Veterans' Welfare Board v. Burt*, 4 Cal. App. 2d 659, 41 P.2d 587.

of the essence, provided that it is accompanied by an offer of compensation for the delay.*

As the trial court itself recognized, however, Section 1492 of the Civil Code is not applicable to this case since, in this case, time was of the essence of the contract.

It is thus apparent that, if the opinion of the trial court is allowed to stand, the express provisions of Section 1492 limiting the vendee's right to reinstatement of the contract to cases in which time was not made of the essence will have been repealed.

It is similarly apparent that, if the opinion of the trial court is allowed to stand, Section 3275 of the Civil Code limiting relief from forfeitures to situations in which the default was not wilful (or grossly negligent or fraudulent) will also have been repealed.

Under the opinion of the trial court in this case, a wilfully defaulting vendee is entitled to get all of the relief available to a vendee whose default was not wilful. Needless to say, Section 3275 is thereby rendered completely meaningless.

It is true that, in *Freedman v. The Rector,* supra, the court declared that the method of relief provided by Section 3275 was not exclusive. It did not hold, however, that all of the relief which can be had under Section 3275 could also be had outside of that section. It merely held that outside of that section, a wilfully defaulting vendee could obtain relief against the unjust enrichment of the vendor.

In one case, the vendee is entitled to the benefit of his

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*That section provides as follows:

"§ 1492. *Compensation after delay in performance.* Where delay in performance is capable of exact and entire compensation, and time has not been expressly declared to be of the essence of the obligation, an offer of performance, accompanied with an offer of such compensation, may be made at any time after it is due, but without prejudice to any rights acquired by the creditor, or by any other person, in the meantime."

bargain. In the other, he is at most made whole as of the time when he entered into that bargain.

It cannot be that the choice as to whether or not to get the benefit of the bargain is to be made by the wilfully defaulting vendee. It cannot be that it is up to him to decide whether to ask for one or the other form of relief depending upon whether the value of the property went up or down.

A nonwilfully defaulting vendee may have that choice. A wilfully defaulting vendee does not (and particularly not when cancellation of the contract is the only remedy available to the vendor).

When time is of the essence and the contract is terminated by the vendor, the wilfully defaulting vendee is no longer entitled to the benefit of his bargain. He is only entitled to relief against the unjust enrichment of the vendor and the penalty which results from that enrichment.

(3) The burden is on the defaulting vendee to prove that he suffered a forfeiture or penalty before he can be entitled to any relief. Union failed to prove that it suffered such a forfeiture or penalty. Hence, it should have been denied relief by way of restitution as well as reinstatement.

Union was entitled to relief, whatever form that relief might take, only if the termination of the contract and the retention by Ward of both the property and the payments resulted in the unjust enrichment of Ward or, conversely, in the infliction of a penalty or of punitive damages upon Union.

As to that issue, the burden of proof was upon Union.

Mere proof that its interest in the property or its rights under the contract were terminated or "forfeited" was not enough. Mere proof of a monetary loss on its part without proof of a corresponding *unjust* enrichment on Ward's part

was not enough either (*Baffa v. Johnson,* supra). Nor was it enough for Union to prove that it had made substantial payments on account of the purchase price and that, at the date of termination of the contract, the property was worth more than the balance remaining to be paid (*Bird v. Kenworthy,* supra).

The test to be applied is not alone the detriment suffered by the vendee as a result of the termination of the contract. It is that detriment compared to the detriment suffered by the vendor as a result of having entered into the contract.

Moreover, the determination of whether the vendor was unjustly enriched and the vendee suffered a penalty is made after and on the assuption that the contract was *cancelled.*

It is with relief from such cancellation that the court is concerned and the question is not whether the vendor is in a better position than he would have been had the contract not been cancelled but whether he is in a better position than he would have been had the contract not been entered into.

It is only if the vendor is in a better position than he would have been had the contract not been entered into that he can be said to have been *unjustly* enriched (and only to that extent that the defaulting vendee can be said to have suffered a penalty).

The fact that the vendor is left in a better position as a result of the cancellation of the contract than he would have been had the contract been fully performed is altogether immaterial (*Bird v. Kenworthy,* supra). And so is the fact that the vendee lost the benefit of his bargain and the profit which he would have made had he performed the contract.

Thus, in this case, before it could be given any relief, it was essential that Union prove that the total of its payments

added to the value of the land (including the improvements) when the contract was terminated exceeded what Ward would have had had the contract never been entered into.

Putting it another way, Union had to prove that the total of its payments (added to the value of the improvements) exceeded the value of what it received from Ward (the use of the property for eight years plus the market value of the timber which it removed therefrom).

Union sought to meet its burden of proof by showing that approximately $585,000 had been paid on account of the purchase price of $750,000; that substantial improvements had been made; and that, as of the time of the termination of the contract, the property was worth substantially more than the balance due on the contract.

The trial court found that approximately $585,000 had been paid on account of the purchase price (156, finding 4); and that substantial improvements had been made (159, finding 12) (in our opinion, the improvements, which consisted solely of access and logging roads, cannot be said to have been substantial. For the purpose of this argument, however, we may assume that they were).

The trial court then found that the termination of Union's rights under the contract resulted in a forfeiture and penalty against which Union was entitled to be relieved (159, finding 13; 160, conclusion 3).

No finding was made as to the value of the property (either with or without the improvements).

Most important of all, no finding was made (*there was no evidence on the basis of which such a finding could have been made*) either as to the value of the use of the land while Union was in possession (from 1946 to 1954) or as to the value of the more than 90 million feet of timber which it removed.

In other words, the trial court "found" that Union was "penalized" by the termination of the contract without determining how much it received under the contract as compared with how much it paid thereunder.

It is our contention that Union could be found to have been *penalized* and Ward could be found to have been *unjustly* enriched only if the value of the use of the land and the value of the timber which it removed were less than the $585,000 which Union paid (coupled with the value of the improvements).

If the use of the land and the timber removed by Union were worth more than $585,000 (plus the value of the improvements), Union was not *penalized* by the termination of the contract and Ward was not *unjustly* enriched by keeping the $585,000 as well as the land in its logged and depleted condition.

It is our further contention that a finding that the vendee was *penalized* and the vendor *unjustly* enriched which is made without considering the value of what the vendee received and the vendor lost while the vendee was in possession is a finding altogether unsupported by the evidence.

The method or yardstick to be used in determining whether the vendee was *penalized* and the vendor *unjustly* enriched is set forth in *Bird v. Kenworthy*, supra.

In that case, the court held that, since the value of the use of the property while the vendor was deprived of it (while the vendee was in possession) was in excess of the payments made by the vendee, the vendor was *not* unjustly enriched nor was the vendee *penalized*.

The vendor was certainly better off as a result of the termination of the contract than he would have been had the contract been completed. But he would have been still

better off had the contract never been entered into. Hence he was not *unjustly* enriched. And the vendee was not *penalized* since he had received more than he paid for.

The trial court in this case sought to distinguish *Bird v. Kenworthy,* supra, on the ground that, in that case, "there was no forfeiture" (151, footnote 14).

The trial court apparently overlooked the real significance of that case. It apparently assumed that there would automatically be a forfeiture if Ward were allowed to keep both the land and the payments and looked to the *Bird* case only as a possible aid in deciding what form the relief from that forfeiture should take.

In the last paragraph of the footnote which it devoted to the case in its opinion (151; 128 F.S. 714), the trial court stated as follows:

> "Since in Bird there was no forfeiture requiring relief, that case affords no guidance in determining the nature of the relief that may be granted in a case such as the present one where there would be a forfeiture requiring relief."

It obviously failed to note that the case was intended to be its guide in determining in the first place whether or not a "forfeiture" or penalty occurred.

In this case, the trial court did not have (because Union did not make it available) the information which it needed to determine whether Union had suffered a "forfeiture".

It did not have the necessary information as to the value of the use of the property from 1946 to 1954 and the market value of the timber removed by Union.

In the absence of the necessary evidence, there could be no finding that Ward was unjustly enriched or that Union suffered a penalty. Conversely, the finding to that effect

which was made by the trial court was clearly unsupported by the evidence.

Needless to say, without such a finding, there could be no conclusion that Union was entitled to relief.

It may be noted that the opinion of the District Court of Appeal in *Bird v. Kenworthy,* 265 P.2d 943 (the very opinion which the Supreme Court of California would not allow to stand), made the very same error which was made by the trial court in this case.

To the trial court in this case, it seemed that a vendee who paid $585,000 on account of a total purchase price of $750,000 should be allowed to complete his contract because the vendor would be unjustly enriched if he were allowed to keep both the $585,000 and the property.

In *Bird v. Kenworthy,* the District Court of Appeal similarly felt that a vendor who paid $24,000 on account of a total purchase price of $29,000 would be unjustly enriched if he were allowed to keep both the property (worth $28,000) and the payments made by the vendee.

At page 948 of 265 P.2d, the court stated that "it is difficult to understand how the judgment that appellant was entitled to no relief whatever can be sustained, as it certainly appears that *here is a case of unjust enrichment if it is possible to have one*". (Italics ours.)

Yet, when it took the case over, the Supreme Court of California held that there was no unjust enrichment.

Since Union failed to prove its case, the judgment should be reversed with directions to deny Union any relief. In any event, it should be reversed with directions to the trial court to determine as a fact rather than assume whether or not Ward was unjustly enriched.

If the value of the use of the land from 1946 to 1954 (including the market value of the timber removed by Union)

was in excess of the amount which Union paid Ward (including the value of the improvements) there was no unjust enrichment, no penalty and no need for any restitution. If it was less than the amount paid, the trial court could find that Ward was unjustly enriched and Union penalized and could accordingly require Ward to refund the difference to Union (less the amounts due Ward for timber removed and unpaid for and for taxes due at the date of termination of the contract) as a condition of having the court quiet his title to the property.

(4)(a) In any event, Union should have been denied all equitable relief because it came into a court of equity with hands particularly unclean.

The trial court found or concluded that justice and equity required that the contract be reinstated.

It is our contention that, far from requiring that it be reinstated, justice and equity required that Union be given no relief at all.

From the very beginning, Union failed to perform the contract according to its terms.

Although the down payment of $25,000 was to be made in cash, it was in fact made by a six months promissory note which was due on November 25, 1946, and was not paid until July 15, 1948 (see exhibit "A" attached to the answer and cross-complaint, pages 52-3).

And as early as June of 1947, Ward found it necessary to write to A. K. Wilson regarding various failures in performance.

When substantial logging began (January 1950), the situation worsened, never to improve until Ward was finally compelled to cancel the contract.

With regularity, Union failed to send scale slips and reports and to make the payments required by the contract.

Default notices thus became a matter of course and a total of 54 such notices were sent over the 52 month period that preceded the cancellation of the agreement (see exhibits I, AB and AC printed as an appendix to this brief).

With two exceptions (May and June of 1951), every payment was approximately sixty days late and only once (May of 1951) did Union send the required scale slips, report and payment by the 20th of the month following the removal of the logs.

The same was true of taxes. Not once did Union pay the taxes when it was required to pay them by the contract. In fact, it paid the taxes for 1950, 1951 and 1952 only after the property had been sold to the State and after Ward had threatened to terminate the contract (see Defendants' exhibits Z and AG).

Although the foregoing conduct certainly does not show the "clean hands" required to obtain relief from a court of equity, it is as nothing compared with the course of conduct which Union began in February of 1954 in an attempt to conceal from Ward its failure to report and pay for all of the logs which it had removed.

It will be recalled that, in June of 1953, Union itself began logging on the Ward lands along with Coast. Reports of logs removed by Coast were sent by Union to Ward with the usual delay but no information at all as to the logs removed by Union, let alone the reports required by the contract, was sent until after it had become known to Union, in February of 1954, that Ward was investigating the matter and was liable to discover the defaults (348-9).

During the latter part of January, 1954, Ward became suspicious of the correctness of Union's reports and instructed its representative in Humboldt County (French) to investigate (284).

In the course of his investigation, French requested and was shown the Coast stumpage book which contained a detailed daily record of the logs removed by Coast. He also requested, but was denied, access to the Union stumpage book (287-9, 315) although the contract gave Ward the right to inspect Union's books (clause 11, page 19).

He was told that that book, along with other Union records, was in Portland, Oregon (315). In fact, however, records containing all of the information he was seeking were in Arcata and could have been made available to him (Defendants' exhibit T, pages 360-1, 371-2).

It is thus apparent that Union sought to conceal from Ward the extent of its 1953 logging operations. The purpose of the concealment was obviously to avoid or at least delay payment for the logs (see the illuminating comment on the subject made by A. K. Wilson to the effect that he "wasn't in any hurry to have them find out" (549-50).

In fact, it is apparent that Union sought to conceal the true facts not only from Ward but from the trial court itself. Whether or not Union maintained records in Arcata was not in itself material. It became material at the trial only because it was essential for Union to try and cover up its failure to disclose the true facts when French asked for them as well as to prove, if it could, that its failure to report and pay for the logs which *it* had removed (as distinguished from the logs removed by Coast) was the result of inadvertence.

In order to achieve those objectives, Union allowed Owens, its Arcata bookkeeper, to commit perjury at the trial.

On direct examination, Owens testified that no information was available to him in Arcata nor did he maintain

any records as to the amount and origin of the logs removed by Union during the period (310, 359).

It is only after he was confronted on cross-examination with photostatic copies of pages from the Union stumpage book *which he maintained* but which he claimed not to have in his possession (Defendants' exhibit T) that he realized that he had been caught deliberately perjuring himself. Thereafter, he broke down, reversed much of his previous testimony and stayed closer to the truth.

In other words, there was not only no inadvertence on Union's part; there was in fact a deliberate concealment of logs removed and thereafter a deliberate attempt to conceal from the trial court the fact that the concealment of the logs had been deliberate.

How, under those circumstances, the trial court nevertheless found it possible to grant equitable relief to Union is something which we certainly cannot explain. Not only were the defaults wilful, as the trial court found them to be, but the evidence would have justified a finding that they were fraudulent.

Under those circumstances, Union should have been denied all relief.

(4)(b) The decision of the trial court is inequitable and unfair.

As applied to the contract between Union and Ward, the decision of the trial court is particularly inequitable and unfair.

It must be recalled that Ward's sole remedy in the event of a breach by Union was to take the property back regardless of its value and regardless of its condition. Ward could neither sue for damages nor sue for the balance due on the contract.

In other words, the contract was in effect a continuing option to buy the land and log the timber rather than an actual contract of purchase and sale.*

Although there was no finding as to the value of the property at the time of the termination of the contract, it was concededly worth at least as much and probably a good deal more than the balance then due under the contract. Otherwise, Union would not have sought to have it reinstated.

If, however, as a result of a drop in prices or for any other reason, the value of the property had gone down rather than up, so that, at the time of the termination of the contract, it was worth less than the balance which was then due on the contract, there would have been no litigation.

Considering that, under the terms of the contract, Union was in a position to give the property back to Ward if its value went down, it should not, merely because the value of the property went up, be allowed to keep Ward from relying upon the provisions of the contract which entitle Ward to take the property back.

Unlike ordinary contracts of purchase and sale, this contract contained an escape clause for the benefit of the vendee.

Under those circumstances, the provisions of the contract intended for the protection of the vendor should be looked upon with less disfavor than they would otherwise be looked upon.

In the ordinary case, the vendee has no choice. He must pay the full purchase price (or at least damages) even though the value of the property goes down and even though he changes his mind and does not want it any more.

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*Although that fact was stressed at the trial, it was completely ignored in both the opinion and the findings of the trial court.

In this case, however, the vendee itself could cancel the contract. If it had done so, the vendor could have invoked neither code sections nor rules of equity in order to obtain relief.

It would seem only fair that the vendor too be allowed to stand on the contract. It would seem that Equity which Union was first to invoke and upon which the trial court so strongly relies should protect all of the parties to the controversy.

CONCLUSION

Under the law of California, Union was not entitled to reinstatement of the contract.

Had it proved the value of the use of the land while Ward was deprived of its possession, it might conceivably have shown itself to be entitled to restitution of part of its payments although its conduct was such that it should have been denied even that form of equitable relief.

The decision of the trial court is in error, however, not only because it fails to apply the applicable California law (which this court itself had previously found to be controlling in such cases). It is also in error because it completely rewrites the contract which the parties (two experienced businessmen dealing at arms' length) had entered into.

Ward had agreed (1) to let Union go into possession and log on the land so long as it complied with the terms of the contract and (2) to take the property back regardless of its condition or value and *release* Union from further liability in the event that Union did not or could not comply with the terms of the contract.

Union in turn was willing to undertake to log on the land and pay the contract price provided, however, that it could

return the land to Ward without subjecting itself to further liability in the event that it did not or could not go on with the contract.

As the trial court rewrote the contract, Ward was still under the *obligation* to take the land back and release Union from further liability should *Union* choose to cancel it. He had lost, however, the corresponding *right* to take the land back should Union fail to comply with the terms of the contract.

Finally, we cannot overemphasize the fact that, if it is allowed to stand, the decision of the trial court will have a very serious and harmful effect on the use of installment contracts and in turn on our entire economy in which such contracts play such a vital part.

The small buyer (whether he is buying a sewing machine or a million dollar tract of land) who cannot afford to pay cash, will find it far more difficult to buy on an installment basis if the law keeps the seller from repossessing the property in the event of a wilful default.

The judgment should be reversed with directions to the trial court to enter judgment in Ward's favor for the amount due him on account of unpaid logs and taxes and to quiet his title to the property.

In the alternative, the case should be remanded to the trial court with directions to try the issue of whether or not a forfeiture in fact occurred.

If none occurred, the trial court should enter judgment in Ward's favor as previously outlined.

If a forfeiture did occur, the trial court should enter judgment in Ward's favor on condition that he refund to

Union the excess of its payments over the damages which he sustained as computed in *Bird v. Kenworthy.*

Dated, Oakland, California,
May 17, 1956

Respectfully submitted

HARDIN, FLETCHER, COOK & HAYES
CARLETON L. RANK
CYRIL VIADRO
Attorneys for Appellants

(Appendix Follows)

Appendix

DEFENDANT'S EXHIBIT I

BLUE CREEK REDWOOD COMPANY, INC.
CONTRACT OF MAY 1, 1946, WITH A. K. WILSON

Date of Check			Amount
5/27/46	Note—Down payment		$25,000.00
5/15/47	Minimum payment due. 5/15/47		40,000.00
5/14/48	" " " 5/15/48		40,000.00
1/19/49	For Logs removed in Nov. & Dec., 1948		1,103.15
1/28/49	" " " from Sec. 30, Twn. 12-2		106.55
2/16/49	" " " in January, 1949		384.99
3/18/49	" " " " February, 1949		2,505.89
4/19/49	" " " " March, 1949		3,808.30
5/16/49	" " " 4/1/49 to 5/15/49		4,547.00
6/18/49	Bal. for logs removed in May, 1949		1,340.29
7/18/49 (Wire)	Bal. of $40,000.00 minimum payment due 5/15/49 for year ending 5/1/49		32,091.12
1/3/50 (Wire)	To apply on logs removed in June, 1949		2,330.63
11/22/49	" " " " " in Oct., 1949		175.35
3/1/50 (Wire)	Bal. for logs removed in Oct. 1949 and payment for logs removed in Nov. 1949		3,280.45
3/18/50	Logs removed in December, 1949		5,372.50
4/8/50	" " " January, 1950		2,541.29
7/20/50	Bal. of minimum due 5/15/50	20,412.49	
	Logs removed in Feb. 1950	5,108.37	
	" " " Mar. 1950	4,898.43	30,419.29
7/28/50	" " " April, 1950		9,005.82
8/25/50	" " " May, 1950		16,258.79
9/19/50	" " " June, 1950		7,698.55
10/21/50	" " " July, 1950		8,382.44
11/20/50	" " " Aug., 1950		8,680.78
12/19/50	" " " Sept. 1950		5,865.01
1/18/51	" " " Oct., 1950		1,642.87
2/20/51	" " " Nov., 1950		4,962.58
3/17/51	Initial payment on NW¼ Sec. 17 and N½ Sec. 18, T. 12 N., R 2 E., Humboldt Co., Calif., added to contract		25,000.00

Date of Check		Amount
3/17/51	For logs removed in Dec. 1950	$ 2,859.99
4/9/51	" " " " Jan. & Feb., 1951	10,954.06
6/18/51	" " " " March, 1951	9,837.28
6/18/51	" " " " April & May, 1951	24,689.80
7/19/51	" " " " June, 1951	10,713.97
10/6/51	" " " " July, 1951	11,963.24
10/19/51	Bal. due for logs removed in July, 1951	173.62
11/19/51	Logs removed in August, 1951	19,381.24
12/18/51	" " " Sept., 1951	13,205.14
1/21/52	" " " Oct., 1951	6,376.38
2/18/52	" " " Nov. 1951	5,453.72
3/20/52	" " " Dec. 1951	9,717.18
4/18/52	" " " Jan. 1952	8,929.56
5/16/52	" " " Feb. 1952	4,763.64
5/16/52	" " " March, 1952	2,709.18
6/4/52	March error	32.08
7/18/52	" " " April, 1952	13,015.40
9/8/52	" " " Bal. April logs	24.64
12/16/52	" " " May, June, July and Aug	26,365.24
12/20/52	" " " September, 1952	8,905.47
1/19/53	" (short)	31.10
1/21/53	" " " October, 1952	11,919.75
2/2/53	" " " November, 1952	5,347.81
3/25/53	" " " December, 1952	5,255.98
4/23/53	" " " January, 1953	4,370.24
5/5/53	" " " (short) Jan. 1953	41.20
5/21/53	" " " February, 1953	6,215.20
(10/6)	(short) Feb. 1953	190.58
6/26/53	" " " March, 1953	5,782.11
(10/6)	(short) March, 1953	70.67
7/22/53	" " " April, 1953	3,111.07
8/21/53	" " " May, 1953	8,854.35
9/23/53	" " " June, 1953	12,544.36
10/21/53	" " " July, 1953	7,358.25
11/24/53	" " " August, 1953	7,435.43
12/16/53	" " " September, 1953	5,544.12
1/21/54	" " " October, 1953	6,509.29
2/17/54	" " " November, 1953	10,302.13
3/27/54	" " " December, 1953	12,401.86

[Endorsed] : Filed Nov. 26, 1954.

DEFENDANT'S EXHIBIT AB

SCHEDULE SHOWING DATE, ITEM IN DEFAULT AND DATE RECEIVED BY UNION BOND & TRUST OF DEFAULT NOTICES SENT UNION BOND & TRUST COMPANY FROM JANUARY 1, 1950 TO DATE.

Date of Notice	Item in Default	Date Received by Union Bond & Trust Co.
1/13/50	For logs removed in June, 1949—only partial payment, insufficient logging slips and no report received	1/17/50
1/13/50	" " " " October, 1949—only partial payment received, no report or logging slips	1/17/50
1/13/50	" " " " November, 1949—no payment, report or logging slips	1/17/50
1/21/50	" " " " December, 1949—no payment or report	1/24/50
5/17/50	For bal. of minimum due 5/15/50 not received	
	" logs removed in February, 1950—no payment received	
	" logs removed in March, 1950—no payment, report or logging slips	5/22/50
5/27/50	For logs removed in April, 1950—no payment or report	5/31/50
6/28/50	" " " " May, 1950—no payment, report or logging slips	6/30/50
7/21/50	" " " " June, 1950—no payment or logging slips	8/10/50
8/22/50	" " " " July, 1950—no payment or logging slips	8/24/50
9/22/50	" " " " August, 1950—no payment or report	9/27/50
10/23/50	" " " " Sept. 1950—no payment, report or logging slips	10/25/50
11/24/50	" " " " Oct. 1950—no payment, report or logging slips	11/27/50
12/22/50	" " " " Nov. 1950—no payment, report or logging slips	12/26/50
1/16/51	" non-payment of $25,000.00 in connection with additional timberland added to contract of May 1, 1946	1/18/51
1/23/51	For logs removed in December, 1950—no payment or report	1/25/51
2/23/51	" " " " January, 1951—no payment, report or logging slips	2/26/51
3/21/51	For logs removed in February, 1951—no payment, report or logging slips	3/24/51
4/21/51	" " " " March, 1951—no payment, report or logging slips	4/24/51
5/21/51	" " " " April, 1951—no payment	5/23/51
8/22/51	" " " " July, 1951—no payment, report or logging slips	No record Mailed by L.S. Fletcher
9/5/51	" " " " June, 1951—no report or logging slips	" " "
9/21/51	" " " " August, 1951—no payment	9/24/51
10/23/51	" " " " Sept., 1951—no payment	10/24/51

Date of Notice	Item in Default	Date Received by Union Bond & Trust Co.
11/21/51	For logs removed in October, 1951—no payment, report or logging slips	11/24/51
1/19/52	" " " " Nov. 1951—no payment	1/19/52
1/25/52	" " " " Dec. 1951—no payment	1/28/52
2/21/52	" " " " Jan. 1952—no payment	2/23/52
3/21/52	" " " " Feb. 1952—no payment	No record sent by L.S. Fletcher
4/21/52	" " " " March, 1952—no payment	4/23/52
5/27/52	" " " " April, 1952—no payment	5/29/52
9/29/52	" " " " May, June, July & Aug, 1952—no payment	10/1/52
10/22/52	" " " " Sept. 1952—no payment	10/24/52
11/21/52	" " " " Oct. 1952—no payment, report or logging slips	11/26/52
12/30/52	" " " " Nov. 1952—no payment, report or logging slips	1/2/53
1/22/53	" " " " Dec. 1952—no payment, report or logging slips	1/24/53
1/24/53	For non-payment of 1st installment of Humboldt County 1952 assessment taxes and tax receipts not received	No record
2/21/53	For logs removed in January, 1953—no payment	2/23/53
3/21/53	" " " " February, 1953—no payment	3/23/53
4/24/53	" " " " March, 1953—no payment, report or logging slips	4/27/53
4/24/53	For non-payment of 2nd installment of Humboldt County 1952 assessment taxes	No record
5/21/53	For logs removed in April, 1953—no payment, report or logging slips	5/25/53
6/23/53	" " " " May, 1953—no payment, report or logging slips	6/25/53
7/21/53	" " " " June, 1953—no payment, report or logging slips	7/23/53
8/21/53	" " " " July, 1953—no payment, report or logging slips	8/24/53
9/22/53	" " " " Aug. 1953—no payment or report	9/24/53
10/19/53	For non-payment of taxes levied in 1950, 1951 and 1952 on lands in Humboldt County covered by timberland agreement of 5/1/46, in the amount of $12,297.16.	10/21/53
10/21/53	For logs removed in Sept. 1953—no payment or report	10/23/53
11/21/53	" " " " Oct. 1953—no payment or report	11/23/53
12/21/53	" " " " Nov. 1953—no payment or report	12/24/53
12/29/53	For non-payment of 1st installment of 1953 assessment taxes on lands in Humboldt County covered by contract of 5/1/46 and tax receipts not received.	12/31/53
1/21/54	For logs removed in Dec. 1953—no payment or report	1/23/54
4/3/54	" " " " Jan. 1954—no payment, report or logging slips	4/5/54
4/3/54	" " " " Feb. 1954—no payment or report	4/5/54
4/21/54	" " " " March, 1954—no payment or report	4/23/54

[Endorsed]: Filed Dec. 1, 1954.

SCALE SLIPS AS REQUIRED BY AGREEMENT, ON REMOVAL OF LOGS.

Red Letters:—Failure to perform. *Black Letters:*—*Performand* on time, partial performance or no record of date of performanee.

Month Logs Removed	Payment by 20th of Following Month	Report by 20th of Following Month	Scale Slips by 20th of Following Month
1949			
June	*	No	*
October	*	No	No
November	No	No	No
December	No	No	?
1950			
February	No	?	?
March	No	No	No
April	No	No	Yes
May	No	No	No
June	No	Yes	No
July	No	Yes	No
August	No	No	Yes
September	No	No	No
October	No	No	No
November	No	No	No
Deeember	No	No	Yes
1951			
January	No	No	No
February	No	No	No
Mareh	No	No	No
April	No	Yes	Yes
May	Yes	Yes	Yes
June	Yes	No	No
July	No	No	No
August	No	Yes	Yes
September	No	Yes	Yes
October	No	No	No
November	No	Yes	Yes
December	No	Yes	Yes
1952			
January	No	Yes	Yes
February	No	Yes	Yes
Mareh	No	Yes	Yes
April	No	Yes	Yes
May	No	Yes	Yes
June	No	Yes	Yes
July	No	Yes	Yes
August	No	Yes	Yes
September	No	Yes	Yes
Oetober	No	No	No
November	No	No	No
Deeember	No	No	No
1953			
January	No	Yes	Yes
February	No	Yes	Yes
Mareh	No	No	No
April	No	No	No
May	No	No	No
June	No	No	No
July	No	No	No
August	No	No	*
September	No	No	*
October	No	No	*
November	No	No	*
Deeember	No	No	*
1954			
January	No	No	?
February	No	No	?
March	No	No	?

(*) Partial Performanee. (?) No Reeord of Date.

(Agreement cancelled May 12, 1954)